IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 10TH JULY 2007 / 19TH ASHADHA 1929

RSA.No. 318 of 2007()

(AGAINST THE JUDGMENT AND DECREE DATED 5/07/06 IN AS.115/2004 ON THE FILES OF THE DISTRICT COURT, ALAPPUZHA ARISING FROM THE JUDGMENT AND DECREE DATED 7/04/2004 PASSED IN O.S.NO.44 OF 2001 ON THE FILES OF THE ADDITIONAL SUB JUDGE, ALAPPUZHA)

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APPELLANTS/APPELLANTS/DEFENDANTS 4 TO 9:

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1. **N.RAMESH KUMAR, SON OF LATE NARASIMHAN POTTY, DHANALAKSHMI BUILDINGS, CHURCH ROAD, ALAPPUZHA.**

2. **N.RAJAGOPAL, SON OF LATE NARASIMHAN POTTY, DHANALAKSHMI BUILDINGS, CHURCH ROAD, ALAPPUZHA.**

3. **N.HARIKRISHNAN, SON OF LATE NARASIMHAN POTTY, DHANALAKSHMI BUILDINGS, CHURCH ROAD, ALAPPUZHA.**

4. **N.BABURAJ, SON OF LATE NARASIMHAN POTTY, DHANALAKSHMI BUILDINGS, CHURCH ROAD, ALAPPUZHA.**

5. **PADMAKSHI, WIFE OF LATE NARASIMHAN POTTY DHANALAKSHMI BUILDINGS, CHURCH ROAD, ALAPPUZHA.**

BY ADV. SRI.B.JAYASANKAR
SRI.S.K.HARISH

..2/-

RESPONDENTS:RESPONDENTS: (PALINTIFFS & DEFENDANTS 1 TO 3 & 10)

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1. **N.REGHUNATHAN POTTY, SON OF LATE NARASIMHAN POTTY, VALIA VEETTIL, THEVALLY, KOLLAM.**

2. **N.RAMACHANDRAN POTTY, SON OF LATE NARASIMHAN POTTY, DHANALAKSHMY BUILDINGS, CHURCH ROAD, ALAPPUZHA.**

3. **N.VISWANATHAN, SON OF LATE NARASIMHAN POTTY, VIDHYA PICTURE PALACE, AVALOOKUNNU P.O., ALAPPUZHA.**

4. **N.SUBRAMONIAN POTTY, SON OF LATE NARASIMHAN POTTY, SILPA BHAVAN, VSSI ROAD, MULLACKAL, ALAPPUZHA.**

5. **P.ANANTHARAMA AITHAL, SON OF SREENIVASA AITHAL, DURGA BHAVAN HOTEL, CULLEN ROAD, ALAPPUZHA.**

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 10/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 318 OF 2007

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Dated this the 10th day of July, 2007

JUDGMENT

Defendants 4 to 9 in O.S.44/2001 on the file of Additional Sub Court, Alappuzha are the appellants. First respondent is the plaintiff and other respondents the other defendants. First respondent instituted the suit seeking a decree for declaration of his title and fixation of boundary and for injunction. The plaint schedule property is a portion of 82 cents originally owned by late Narasimhan Potty, father of first respondent plaintiff and defendants 1 to 8. Plaintiff and defendants 1 to 3 are the children born to Narasimhan Potty in his first wife Sathyabhama and defendants 4 to 10 are the children born to him in second wife Padmakshy, the 9th defendant. Narasimhan died on 6.8.1974. On his death his right admittedly devolved as provided under Ext.A1 Will executed on 24.8.1974. As per the Will plaint

schedule property was bequeathed to first respondent. The suit was filed to fix the boundary and for declaration of his title and and possession over the plaint schedule property. Respondents filed a written statement contending that description of the plaint schedule property as given in the plaint is incorrect and the same is given in such a manner as to include a portion of property owned and possessed by them and therefore the first respondent is not entitled to the decree sought for.

2. Learned Munsiff appointed a Commission and the Commissioner submitted Ext.C1 report and Ext.C3 plan demarcating the properties in accordance with Ext.A1 Will. Learned Munsiff on the evidence of Pws.1 to 5 and Exts.A1 and A2, B1 and C1 to C3 and X1 and X2 granted a decree in favour of first respondent accepting Ext.C3 plan. Appellants challenged the decree and judgment before District

Court,Alappuzha in A.S.115/2004. Learned District Judge on reappreciation of evidence confirmed the findings of the learned Munsiff and dismissed the appeal, which is challenged in the second appeal.

3. Learned counsel appearing for appellants was heard.

4. The argument of learned counsel appearing for appellants is that Advocate Commissioner has not properly demarcated the properties as per Exts.A1 Will and the property is to be divided in a straight line, the northern point being the small gate and the southern point being the mango tree and Commissioner has not drawn a straight line and instead made a bent and therefore plaint schedule property was not demarcated in accordance with the intention of the testator and therefore courts below should not have fixed the boundary accepting Ext.C3 plan and therefore the decree and judgment are unsustainable.

5. Learned counsel relied on the recitals in Ext.A1 Will to support his argument that what was intended by the testator was to divide the property after drawing a straight line from the two points mentioned in Ext.A1, namely the northern small gate and southern mango tree and instead Commissioner has drawn a bent which is unauthorised and as the decree was passed accepting Ext.C3, the decree and judgment are not sustainable.

6. On hearing the learned counsel , I do not find any substantial question of law involved in the appeal. What was argued by learned counsel was that courts below should not have accepted the demarcation made by the Commissioner in Ext.C3 plan. What was argued was that the intention of the testator was to divide the property into two half after drawing a straight line which connects two points and as Commissioner has not separated the property accordance with the intention of the

testator, the decree is unsustainable. The trial court and the first appellate court has considered this point in detail and had given sufficient reasons why the property has to be divided as has been done by the Commissioner in Ext.C3 plan. That is a factual finding. It cannot be interfered in exercise of the powers of this court under section 100 of the Code of Civil Procedure. A reading of Ext.A1 Will show that intention of the testator was to divide the property into two parts by drawing a line connecting two points specifying that the division shall be in such a way that the buildings mentioned therein should be on the respective portions. Under Ext.C3 plan, it is divided as provided in Ext.A1. The bent challenged by the appellants was on account of the western wall of the existing building standing in the property to the east of that line. As per the Will that building must be on the eastern plot. On

analysing the evidence and also taking note of the objections raised by appellants the trial court and the first appellate court found that the Commissioner has demarcated the property in Ext.C3 plan in accordance with Ext.A2 Will. In such circumstances, as no substantial question of law is involved in the appeal, it is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006